Supreme Court, U.S.
FILED
JUN 8 1993
OFFICE OF THE CLERK

No. 92-1736

In The

Supreme Court of the United States

October Term, 1992

MELVIN MOSS,

Petitioner,

v.

PARKS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE PETITIONER IN REPLY

* Ralph Ogden
Wilcox & Ogden, P.C.
1120 Lincoln Street
Suite 1306
Denver, Colorado 80203
303-861-5501

Joseph A. Mooneyham
Harris & Graves, P.A.
P.O. Box 6263
Greenville, South Carolina 29606
803-235-1331

June 10, 1993

* Counsel of Record

Attorneys for the Petitioner

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether Congress reserved to the Secretary of the Consumer Product Safety Commission the power to "fill in the interstices" of the broadly worded Section 2(p)(1)(F) of the Federal Hazardous Substances Act, 15 U.S.C. § 1261(p)(1)(F), as to risks of injury and illness not covered by any federal regulation, or whether, in the absence of any clarifying regulations promulgated by the Secretary, the states can interpret and enforce their interpretations of this paragraph in light of Congress' expressed intent that the states adopt and implement enforcement mechanisms which parallel and complement the enforcement mechanisms of the Federal Hazardous Substances Act.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

I. This Case Is Significant Because It Affects The Laws of All Fifty States 1

II. The Conflict Between The Second, Fourth, and Ninth Circuits Is Real 2

III. At Least One Lower State Court Disagrees With The Fourth Circuit Holding In the Case At Bar 3

IV. There Is A Genuine Issue of Material Fact Over the Adequacy of Parks' Label 4

V. Conclusions 6

TABLE OF AUTHORITIES

Page

CASES

Chemical Specialties Manufacturers Association v. Allenby, 958 F.2d 941 (9th Cir. 1992) (cert. denied 1992) 2

Toy Manufacturers of America, Inc., v. Blumenthal, 986 F.2d 615 (2nd Cir. 1993) 2

Jenkins v. James B. Day and Company, No. 91AP1124 (Ohio App. March 24, 1992) (unpublished, 1992 W.L. 63307) (Leave to appeal granted, No. 92-1002, Ohio Supreme Court, September 23, 1992) 3

STATUTE

15 U.S.C. § 1261(p)(1)(E) 4

No. 92-1736

In The

Supreme Court of the United States

October Term, 1992

MELVIN MOSS,

Petitioner,

v.

PARKS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE PETITIONER IN REPLY

I

THIS CASE IS SIGNIFICANT BECAUSE IT AFFECTS THE LAWS OF ALL FIFTY STATES

This case presents the Court with an opportunity to determine, for the benefit of all fifty states, a significant question about the relationship between the states and the federal government; i.e., how much and what kind of power Congress intended the states to wield in the enforcement of labeling requirements for hazardous substances sold in interstate commerce.

The definitive resolution of this question will tell all fifty states whether they can continue to enforce failure to

warn claims under their tort laws. It will also tell them the extent to which they can administratively enforce their own labeling requirements.

Because this question affects so many states in so many ways, its resolution should not be put off until another day. The several states deserve to know as quickly as practicable the scope of their authority in this area.

II

THE CONFLICT BETWEEN THE SECOND, FOURTH, AND NINTH CIRCUITS IS REAL

Parks acknowledges that " . . . on the surface, it appears there is a conflict among the Second, Fourth, and Ninth Circuits regarding the preemptive nature of the FHSA." (Brief in Opposition, at pages 6-7) It then attempts to minimize this conflict by arguing that because *Toy Manufacturers of America Inc. v. Blumenthal*, 986 F.2d 615 (2nd Cir. 1993) and *Chemical Specialties Manufacturers Association v. Allenby*, 958 F.2d 941 (9th Cir. 1992) (cert. denied 1992) dealt with state statutes rather than tort claims, they are distinguishable.

All three cases, however, interpret the same preemption language in the FHSA. Only the Fourth Circuit held that states could not "fill in the interstices" of the very generalized labeling requirements of the FHSA and that the states could not require more specific warnings. Both the Second and the Ninth Circuits held that Congress did not remove this power from the states.

To the extent that Congress intended the FHSA to preempt state tort remedies, the legal reasoning which forms the basis of the Second and Ninth Circuit opinions would apply as well to tort claims as to statutes and regulations, just as the legal reasoning which forms the basis of the Fourth Circuit decision applies to statutes and regulations as well as it applies to tort claims.

Only this Court can determine which reasoning is correct.

III

AT LEAST ONE LOWER STATE COURT DISAGREES WITH THE FOURTH CIRCUIT HOLDING IN THE CASE AT BAR

Since filing the petition for certiorari, counsel have learned of a conflicting, albeit unpublished, opinion of the Ohio Court of Appeals. In *Jenkins v. James B. Day and Company*, No. 91AP1124, decided March 24, 1992 (1992 W.L. 63307),[1] the Ohio Court of Appeals held that "since the Federal Hazardous Substances Act does not clearly express an intention to preempt state court product liability actions, the statute must be construed to permit such actions." (Slip. Op. at 1152).

Jenkins was decided on summary judgment, which the court of appeals reversed, noting that there was a genuine issue of material fact about whether the warning label "really did provide an adequate affirmative statement of the principal hazard or hazards" associated

---

[1] On September 23, 1992, the Ohio Supreme Court granted leave to appeal. *Jenkins v. James B. Day and Company*, Case No. 92-1002.

with the product. (Slip. Op. at 1152) *See*, 15 U.S.C. § 1261(p)(1)(E), which requires labels to include an "affirmative statement of the principal hazard or hazards."

If Melvin Moss had been injured in Ohio, and if Parks' preemption argument had been decided by the Ohio Court of Appeals rather than by the Fourth Circuit, his case would have been remanded for trial on the merits.

In addition to the conflict among the federal circuit courts of appeal, then, there is a conflict between the opinion of the Fourth Circuit and the opinion of at least one state appellate court on a question of vital interest to the states.

IV

THERE IS A GENUINE ISSUE OF MATERIAL FACT OVER THE ADEQUACY OF PARKS' LABEL

At pages 11-14 of its Brief in Opposition to Certiorari, Parks argues that its label complies with all of the requirements of the Federal Hazardous Substances Act. In particular, Parks argues that its warning to "Keep Away From Heat and Open Flame" satisfies the Act's requirement that labels contain a statement of the "precautionary measures describing the action to be followed or avoided . . . " to use the product safely.[2]

Parks is therefore arguing, as it did in the Fourth Circuit and as it must to prevail, that *any* statement of one

---

[2] As noted in the Petition for Certiorari at pages 12-13, the adequacy of Parks' warning was seriously challenged by petitioner's expert, Dr. Karnes.

or more precautionary measures is adequate as a matter of law. The states, according to Parks and the Fourth Circuit, cannot determine, either by administrative regulation or tort proceeding, whether a warning is adequate because that determination would require the states to "fill in the interstices" or impose additional labeling requirements not specified in the FHSA. Under this interpretation of the Act, the power to determine the adequacy of a given label as well as the power to impose additional, or more specific, labeling requirements is reserved exclusively to the Secretary of the Consumer Product Safety Commission, even if the additional, more specific requirements do not conflict with the requirements of the FHSA.

If Parks' argument does anything, it emphasizes the need for a decision by this Court to determine whether any of the states has any enforceable tort remedy for inadequately labeled products. The answer to that question should be the same in all of the states, since Congress clearly intended the FHSA and its preemption rules to apply uniformly throughout the country.

CONCLUSION

For all of the above reasons, and for the reasons set forth in the Petition for Certiorari, the petition should be granted.

Respectfully submitted,

RALPH OGDEN
WILCOX & OGDEN, P.C.
1120 Lincoln Street
Suite 1306
Denver, Colorado 80203
(303) 861-5501

JOSEPH A. MOONEYHAM
HARRIS & GRAVES, P.A.
P.O. Box 6263
Greenville, South Carolina 29606
(803) 235-1331

Attorneys for Petitioner